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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1842

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner,*

v.

HOME BOX OFFICE, INC., *et al, Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

ERWIN G. KRASNOW
JAMES J. POPHAM
Attorneys for Petitioner

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

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The National Association of Broadcasters (NAB) hereby replies to the oppositions of respondents Home Box Office, Inc., *et al.* (Home Box Office), Columbia Pictures Industries, Inc., *et al.* (Columbia), National Citizens Committee for Broadcasting (NCCB), and United States (U.S.).

Respondents have sought to obscure the real and fundamental public interest issues arising from the development and expansion of pay cable television service. Like the court below, respondents mischaracterize the nature of broadcast-pay cable competition as well as the purpose and effect of the pay cable program

restrictions adopted by the Federal Communications Commission (Commission). Consequently, respondents and the court below have embraced untenable legal conclusions and arguments and certiorari should be granted.

I.

The issue in this case is not whether an infant industry, struggling to provide a new and diverse program service to the American public should be stifled by arbitrary protectionist regulation designed to insulate entrenched broadcast interests from fair competition in the marketplace. (Home Box Office Brief at 4). Nor is it merely the adequacy of the record. (U.S. Brief at 11-12).

The real issue is whether a pay television service subsidized by cable television's privileged use of broadcast signals and incapable of providing service "to all the people of the United States," 47 U.S.C. § 151, should be permitted to develop in the absence of regulatory safeguards designed to insure that those viewers for whom pay cable service is either unavailable or unaffordable are not deprived of the quantity or quality of broadcast program service now available to all viewers without direct charge.

The rules in question were neither designed nor intended to protect broadcasters by inhibiting a competitive service offered by an emerging, infant technology. Pay cable television has left its infancy and now is an established, successful and growing communications industry.[1] Since 1975, when the pay cable program re-

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[1] A recent article notes that Home Box Office "is heading into a new TV season with its key executives firmly in place, its programming plan solidified and profits instead of red ink." PAY TV NEWSLETTER, September 20, 1977, at 1.

strictions were adopted, the number of pay cable subscribers has increased from 100,000[2] to 1,173,863, and pay cable service is available to 10,779,029 homes passed by cable systems which provide pay programming.[3] In view of pay cable's rapid growth, pay cable development hardly appears to have been stifled by the FCC's program restrictions. However, even the court below recognized that pay cable never will be a universal service.[4] Therefore, regulation was considered necessary not to protect broadcasters, but to protect the interests of the majority of television viewers to whom pay cable television is not and probably never will be available or affordable.

Furthermore, the rules are not anti-competitive. They are no more than appropriate adjustments justified by pay cable's advantageous competitive posture. Broadcast-pay cable competition hardly resembles normal marketplace competition. But for broadcast television, the type of pay cable television operation subject to the program restrictions would not exist. Pay cable programming is distributed via an otherwise unused, excess channel available on a cable system. The marginal cost of using that channel for distribution is zero because the cable is in place and paid for by cable subscribers' fees for basic service. That basic service is, of course, retransmission of broadcast signals. Cable systems presently pay nothing for use of the broadcast programming distributed on these channels and will pay only token copyright fees under a compulsory

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[2] *First Report and Order*, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 2 (1975).

[3] PAY TV NEWSLETTER, September 20, 1977, at 3.

[4] FCC App. A at 34-35.

license scheme which goes into effect on January 1, 1978.[5] Only through their reliance on broadcast signals can they offer pay cable service in competition with broadcast services. This is not a normal competitive situation. Free and fair competition would exist only where a cable system provides pay cable service without the benefit derived from retransmission of broadcast signals. In such a case, the program restrictions would not be applicable.

This Court has recognized that broadcasting is "demonstrably a principal source of information and entertainment" for most of the people of this country [6] and that cable television services, which are not available "to all the people of the United States" 47 U.S.C. § 151, should be subject to regulation in order to prevent any diminution of the present or potential benefits which the broadcast service provides or will provide to all television viewers.[7] Respondents and the court below have failed to come to grips with this fundamental issue. Consequently, the court erroneously denied the Commission authority to take appropriate regulatory steps to prevent this public interest harm and erected inapplicable constitutional barriers to adoption of proper regulatory measures.

II.

When pay cable television is provided in conjunction with cable retransmission of broadcast signals, the

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[5] Pub. L. 94-553, Section 111, 90 Stat. 2550-2558.

[6] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

[7] *Id.* at 175, n. 43.

Commission's regulatory authority as recognized and delineated by this Court in *Southwestern Cable Co., supra,* and *Midwest Video Corp.*,[8] is undeniable. Therefore, the inconsistency of the opinion below with the *Southwestern* and *Midwest* decisions is stark and glaring.

In *Southwestern* this Court recognized the Commission's fundamental responsibility to develop and maintain a nationwide television broadcast service and affirmed the Commission's regulation of cable retransmission services available only to a few viewers for the purpose of preserving the benefits of the universally available, nationwide broadcast service for all viewers.[9] Noting that the Commission's responsibility went beyond assuring that broadcast stations remained on-the-air, this Court in *Midwest* held that the Commission had authority to require cable systems which retransmitted broadcast signals to originate programming for the purpose of enhancing the diversity of programs available to cable subscribers.[10] The pay cable program restrictions adopted shortly after adoption of the origination requirement served the same basic purpose as the regulations approved in *Southwestern.* They, too, were designed to insure that the service available to all the people was not diminished as a result of cable systems' providing additional services to small groups of viewers. They, too, preserve the existing program diversity for all viewers while encouraging meaningful diversity (i.e. something more than the same types of programs available on broadcast

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[8] *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

[9] 392 U.S. at 177.

[10] *Midwest Video, supra,* 406 U.S. at 664.

television without commercials) in pay cable programming. A finding that the Commission may regulate one aspect of cable service which jeopardizes fulfillment of its statutory obligations to maintain the nationwide, universally available broadcast service, but not another is arbitrary and senseless.

Respondents also concur with the court below in its erroneous view that the Commission lacks authority to adopt pay cable program restrictions because it is asserting authority which exceeds its authority over broadcasting.[11] Respondents' position completely ignores the fact the Commission does regulate broadcasting for the same purposes for which it regulates pay cable. (NAB Petition at 17).

III.

The irony of respondents' claims to First Amendment rights is striking because what they really claim is the right to deprive the majority of television viewers of access to their product in order to secure more substantial economic rewards from exhibiting it to the remaining few. Program restrictions applicable to over-the-air pay television (STV), after which the pay cable rules were patterned, were designed to prevent this deprivation to the entire public and, thus, were found to produce "a First Amendment gain" because the viewing public would receive "more rather than less diversity of expression in its television programming."[12] No logical basis exists for concluding that less restric-

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[11] U.S. Brief at 13-14; Home Box Office Brief at 20.

[12] *National Association of Theatre Owners (NATO)* v. *Federal Communications Commission*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

tive regulations applicable to pay cable television will produce any other than the same First Amendment gain. Not only do the rules preserve the existing diversity of broadcast programming, but they also tend more to encourage rather than inhibit a diversity of pay cable programs.[13] The pay cable program restrictions dealt only with program types already available to the viewing public on broadcast television, not with any new or diverse program types which actually would have enhanced the diversity of program types available to pay cable subscribers. To the extent the rules might have precluded pay cable exhibition of programs which would not be broadcast on commercial television, the Commission adopted a flexible waiver policy designed to permit pay cable exhibition of such programs which were unsuitable or undesirable for broadcast. Thus, under the pay cable program restrictions, pay cable remained totally unencumbered in any effort to enhance the diversity of program types available to its subscribers.

Thus, the court below erroneously has found a First Amendment violation where a different panel of the same court had found none. *NATO, supra.* Similarly, the pay cable rules were no more "overly broad" than the restrictions applicable to STV upheld by the court below in the instant decision and in *NATO.*

Respondents also lose sight of the nexus between cable retransmission of broadcast signals and the application of the rules. No pay cable exhibitor is subject to any restriction unless the pay cable programming is

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[13] The advertising prohibition and the 90 percent limitation were adopted to insure that pay cable service did not simply mirror broadcast service but for a fee.

exhibited on a cable system which also transmits broadcast signals. The rules hardly constitute an outright restriction, but more closely resemble a condition of cable's privileged use of broadcast signals. Characterizing pay cable as a separate and different operation blinks reality. Whereas this Court saw a logical distinction between retransmission and origination in terms of what constitutes a performance for copyright purposes, it acknowledged that both services were "sold as a package."[14] Respondents attempt to distinguish regulation of origination programming from the requirement to initiate origination ignores this Court's perception that the authority to require origination programming subsumes the authority to regulate voluntarily undertaken origination.[15] Therefore, the lower court's (FCC App. at 80) comparison of cable systems and newspapers vis-a-vis the First Amendment is totally unwarranted and incorrect.

IV.

This Court should not exclude the feature film rules from its review of the decision below as urged by respondents.[1] Review devoid of consideration of the feature film rules would leave the extent of the Commission's authority and the relevant Constitutional boundaries regarding pay cable regulation uncertain. This is undesirable in view of the critical public interests at stake. Although the Commission has not sought review of the feature film restrictions, it has offered no substantial reason for limiting the scope of this Court's review. The Commission's action is unexplained, but

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[14] *TelePrompTer Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394, 405 (1974).

[15] NAB Petition at 24-25.

for one isolated and unenlightening bit of speculation by one Commissioner.

The public interest questions are no less critical in the case the feature film rules. The Commission chose to adopt rules applicable to sports events and feature films not because those program types were *per se* worthy of special treatment. They were selected because they were among the most popular broadcast program types and, moreover, because they were the type of programs most exhibited by pay television services. In short, they were the program types which would be removed from broadcast television to pay cable television. No distinction exists in the rationale underlying the rules nor in the issues presented for review.

Resolution of the issues presented in this case is critical to the Commission's ability to carry out its responsibility to insure that program services available to only a few do not displace or subvert broadcast program services available to all. The public never must be placed in the position of paying for or, at worst, losing popular broadcast program fare now available to all without direct charge. Therefore, comprehensive review of these issues by this Court is absolutely essential to define the Commission's authority to deal effectively with this significant public interest matter.

Respectfully submitted,

ERWIN G. KRASNOW
JAMES J. POPHAM

Attorneys for Petitioner

NATIONAL ASSOCIATION OF BROADCASTERS
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Washington, D.C. 20036

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